

NO. 42701-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RAVEN VICTORIA PIERCE,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
2012 JUN 12 AM 11:10
STATE OF WASHINGTON
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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Beverly G. Grant

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to enter written findings of fact and conclusions of law after the 3.5 hearing.

2. The trial court erred in sentencing appellant to a total term of confinement and community custody which exceeds the statutory maximum in violation of RCW 9.94A.701(9).

Issues Pertaining to Assignments of Error

1. Is reversal required where the trial court failed to enter required written findings of facts and conclusions of law after the 3.5 hearing and the error was not harmless because the court's error prevents appellate review?

2. Is a remand required because the trial court erred in imposing a sentence where the total term of confinement and community custody exceeds the statutory maximum in violation of RCW 9.94A.701(9)?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

¹ There are four verbatim report of proceedings: 1RP - 06/06/11 (voir dire); 2RP - 06/06/11, 06/07/11); 3RP - 06/08/11, 06/09/11 a.m., 06/17/11, 07/15/11, 10/14/11; 4RP - 06/09/11 p.m. In accordance with RAP 10.3(a)(4), the Statement of the Case only contains facts and procedure relevant to the issues presented for review.

On November 8, 2010, the State charged appellant, Raven Victoria Pierce, with one count of identity theft in the second degree, two counts of theft in the second degree, and one count of forgery. CP 1-3. Following a 3.5 hearing and a three-day trial before the Honorable Beverly G. Grant, on June 9, 2011, a jury found Pierce guilty of identity theft and two counts of theft in the second degree but not guilty of forgery. CP 75-78; 4RP 2-4. Pierce stipulated to her prior record and the court sentenced her to 57 months in confinement with 12 months of community custody on October 14, 2011. CP 81-83,² 90-91; 3RP 295-96.

Pierce filed a timely notice of appeal. CP 97.

2. Substantive Facts

a. 3.5 Hearing

While working patrol on November 1, 2010, Deputy Daniel Hacker was dispatched to the home of Michelle Walker. 2RP 13-14, 21-22. Hacker testified that Walker told him that her DSHS debit card “had been fraudulently used” and she thought Pierce “might have been the one who did it.” 2RP 14-15. After getting a description of Pierce from Walker, he went to a nearby 7-Eleven where the card had been used and reviewed the surveillance video. Hacker recognized Pierce on the video

² The Stipulation on Prior Record and Offender Score erroneously states that Pierce entered a plea of guilty to the charges.

and went to Pierce's apartment where she was fairly cooperative and allowed him into her home when he asked to come in. 2RP 15-16.

Hacker advised Pierce of her rights and "let her know what I was there for, and talked to her about the incident." 2RP 16. She said she understood her rights. He did not make any threats or promises and she spoke with him voluntarily. 2RP 17-18. Pierce initially denied being involved but when Hacker told her that he had "video surveillance evidence," she said she was at the 7-Eleven using her own card. 2RP 18-19.

Hacker placed Pierce under arrest and while transporting her to the jail, "he was talking to her about the victim and the precarious position that it put her in." 2RP 19-20. When they arrived at the sallyport of the jail, Pierce admitted using Walker's card. She said she watched Walker using her PIN number and switched the cards but did not sign Walker's card. Hacker recalled that Pierce was with her boyfriend at the 7-Eleven, but she said he was not involved in the fraud. 2RP 20-21.

In contrast, Pierce testified that Hacker came to her home and when she let him in, he asked her if she knew Michelle Walker. Pierce said she did and then Hacker advised her of her rights. 2RP 30-31. She asked Hacker what was going on and he said Walker told him she took her card and used it. Pierce told Hacker that she did not steal Walker's card

and that Walker let her use her card but Hacker did not believe her. 2RP 31, 35-36. He placed her under arrest and handcuffed her even though she was seven months pregnant. Hacker said that if she was not cooperative, he would return and arrest her boyfriend as an accomplice. 2RP 31-32.

On the way to the jail, Hacker told her that Walker was crying and very upset but Pierce kept her head down and did not say anything. When they arrived at the sallyport, Hacker repeatedly said that if she told the truth, "I'll only book you with the identity theft and not the other charges." Pierce did not respond. 2RP 33-34. Hacker asked her how she obtained Walker's PIN number but she gave no response, "I just didn't say anything because he wasn't listening to me anyway." 2RP 35. When he asked her how the signature got on Walker's card, she said she did not know and that she did not sign anything. Pierce never told Hacker that she switched the cards. 2RP 35-36.

No other witnesses testified and the court made an immediate oral ruling that Pierce's "statements were made freely and voluntarily to the officer." 2RP 40-41. The court did not enter written findings of fact and conclusions of law.

b. Trial

Michelle Walker testified that on November 2, 2010, she went to the DSHS office when she learned that her debit card had been deactivated.

A woman at the office checked the numbers on the card and told her it was an old card that belonged to Raven Pierce. 2RP 49-52. Walker and Pierce were “friends.” 2RP 52. Walker met Pierce in September at a neighborhood school bus stop while waiting to send their children to school. Pierce came over to her house several times to sit and talk. 2RP 52-53. They walked to a nearby 7-Eleven a few times to buy snacks. 2RP 54. Walker recalled that she used her debit card and Pierce was standing next to her when she punched in the code numbers. 2RP 54-55. The DSHS office said they could not help her so she contacted the police. 2RP 57-58.

Deputy Hacker testified that he went to Walker’s home to investigate a complaint. 2RP 104-05. Walker told him that she believed Pierce fraudulently used her debit card and showed him documentation from DSHS. 2RP 106-08. Hacker went to a 7-Eleven near Walker’s apartment where some transactions took place and reviewed the surveillance video. He recognized Pierce on the video tape based on a description that Walker provided. 2RP 108-09. Thereafter, Hacker located Pierce at her apartment. 2RP 116. Pierce initially denied the accusations but subsequently admitted that she switched her card with Walker’s card. 2RP 117-22.

The State also called Valerie Vertz as a witness. Vertz provided testimony as the manager of the Electronic Benefit Transfer program for the Department of Social and Health Services. 2RP 71-72.

Pierce testified that she and Walker were friends and they went grocery shopping together. 3RP 172-74. On certain occasions when Pierce was on her way to a store, she would pick up items for Walker. 3RP 173-74. Two or three times, Walker gave Pierce her debit card to make some purchases for her when Pierce went shopping but she always returned the card to Walker. 3RP 175-76. Pierce's boyfriend, LaMontez Patton, drove Walker and Pierce to go shopping a few times. 3RP 155. Patton testified that he heard conversations between Pierce and Walker. Pierce would ask Walker, "Do you want me to go to the store for you? Do you want me to grab this for you?" 3RP 157. When Patton learned about the allegations, he was "kind of shocked because they were friends." 3RP 157.

c. Sentencing

The court sentenced Pierce to 57 months in confinement and 12 months of community custody for the identity theft in the second degree and 29 months in confinement for each of the thefts in the second degree and ordered the sentences to be served concurrently. CP 90-91; 3RP 295-96.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED UNDER CrR 3.5(c).

Reversal is required where the trial court failed to enter written findings of fact and conclusions of law as required under CrR 3.5(c) and the court's error was not harmless.

When statements of the accused are to be offered in evidence, the trial court must hold a hearing to determine whether the statements are admissible. CrR 3.5(a). Following the hearing, the court must enter written findings of fact and conclusions of law:

After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5(c).

"CrR 3.5 requires the trial court to enter written findings of fact and conclusions of law with sections on undisputed facts, disputed facts, conclusions regarding disputed facts, and the conclusion and reasons regarding the admissibility of the defendant's statements." State v. France, 121 Wn. App. 394, 401, 88 P.3d 1003. Written findings and conclusions facilitate and expedite appellate review of the issues. State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). "[T]he timely filing of

findings and conclusions after a suppression hearing is not an empty formality. It is required by court rule. CrR 3.5(c).” State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). A trial court’s failure to issue written CrR 3.5 findings and conclusions constitute harmless error only “if the court’s oral findings are sufficient to allow appellate review.” State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), review denied, 137 Wn.2d 1023, 980 P.2d 1282 (1999).

At the 3.5 hearing here, Deputy Hacker testified that Pierce admitted using Walker’s card and said she watched Walker using her PIN number and switched her card with Walker’s card. 2RP 20-21. Hacker claimed that Pierce spoke with him voluntarily and he did not make any threats. 2RP 17-18. Pierce testified to the contrary, explaining that she told Hacker she did not steal Walker’s card and that Walker let her use her card but Hacker did not believe her. He placed her under arrest and handcuffed her even though she was seven months pregnant and said that if she was not cooperative, he would return and arrest her boyfriend as an accomplice. 2RP 31-36.

The trial court made an oral ruling immediately after Hacker’s and Pierce’s testimony:

Having heard the testimony of the officer and defendant, this Court finds that there was probable cause for the arrest, that Miranda rights were given, and she understood them,

and that her statements were made freely and voluntarily to the officer.

2RP 40-41.

As the record reflects, despite disputed facts, the court only orally stated its conclusions without making any findings of fact. Furthermore, the court failed to enter written findings of fact and conclusions of law. Consequently, the court did not set forth the undisputed facts, disputed facts, conclusions as to the disputed facts, and reasons for the admissibility of Pierce's statements, as required under CrR 3.5(c).

This Court should not condone the trial court's failure to enter written findings, especially when appellate courts have brought to attention of the trial courts that "absent or untimely findings have long been a chronic appellate issue." State v. Portomere, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995), review denied, 129 Wn.2d 1019 (1996). Underscoring the necessity and importance of written findings of fact, the Court stated, "With the parties and court working in concert to ensure that findings are properly entered, we can hope that our overworked court system will operate more efficiently in the future." Id.

The trial court's inexcusable failure to make oral findings and enter written findings prevents proper appellate review, in violation of Pierce's constitutional right to appeal under Wash. Const. article I, section 22. The

absence of written findings and conclusions is particularly critical because the trial court admitted alleged admissions by Pierce.

Reversal is required because the court's failure to enter required written findings and conclusions was not harmless error. Miller, 92 Wn. App. at 703; State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008).

2. A REMAND IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDS THE STATUTORY MAXIMUM IN VIOLATION OF RCW 9.94A.701(9).

A remand is required because the total term of confinement and community custody exceeds the statutory maximum in violation of RCW 9.94A.701(9) and therefore the sentence is unlawful.

RCW 9.94A.701(9) provides in relevant part:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.

In State v. Boyd, ____ Wn.2d ____, 275 P.3d 321, 322 (2012), the Washington Supreme Court held that for defendants sentenced after RCW 9.94A.701(9) became effective, the trial court must reduce the term of community custody to bring the total term within the statutory maximum. The Court recognized that in In re Personal Restraint of Brooks, 166

Wn.2d 664, 211 P.3d 1023 (2009), it held that when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term may not exceed the statutory maximum. Citing State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011), the Court reaffirmed that the “Brooks notation” procedure no longer complies with statutory requirements. Id.

The Court concluded that when a trial court erroneously imposes a total term of confinement and community custody in excess of the statutory maximum, notwithstanding a Brooks notation, a remand is required for the trial court to either amend the community custody term or resentence the defendant consistent with RCW 9.94A.701(9). Id. at 322-23.

Here, Pierce was convicted of identity theft in the second degree which has a standard range of 43 to 57 months and a statutory maximum of five years (60 months). CP 87. The trial court sentenced Pierce to 57 months of confinement and 12 months of community custody. CP 90-91. The total term of 69 months exceeds the statutory maximum in violation of RCW 9.94A.701(9). Although the Judgment and Sentence provides that the total term cannot exceed the statutory maximum, under Boyd, such a notation is no longer sufficient. Pursuant to the holding in Boyd, a

remand is required for the trial court to correct its error by either amending the community custody term or resentencing Pierce in accordance with RCW 9.94A.701(9).

D. CONCLUSION

For the reasons stated, this Court should reverse Pierce's convictions. If this Court affirms the convictions, a remand is required for the trial court to correct its unlawful sentence.

DATED this 11th day of June, 2012.

Respectfully submitted,

A handwritten signature in cursive script, reading "Valerie Marushige", written over a horizontal line.

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Raven Victoria Pierce

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Raven Victoria Pierce, DOC # 885035, Washington Corrections Center, 9601 Bujacich Road NW, Gig Harbor, Washington 98332-8300.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of June, 2012 in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

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